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No. 04-1299

MAY 6 - 2005
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IN THE

Supreme Court of the United States

JULIO CESAR WILSON STAJANO, ET AL.,
PETITIONERS

v.

UNITED TECHNOLOGIES CORPORATION, ET AL .

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

REPLY BRIEF

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PRELIMINARY STATEMENT

Petitioners respectfully submit this Brief in Reply to Respondents' Brief in Opposition.

OBJECTIONS TO RESPONDENTS' COUNTER-STATEMENT OF QUESTIONS PRESENTED

Petitioners respectfully object to the Questions Presented submitted by Respondents, inasmuch as they state or imply that: a) Respondents' summary judgment motion was based upon a defense other than Respondents' military contractor defense; b) there is no conflict between the federal circuit courts and the state courts on the federal government contractor defense; and c) that any of Respondents' state law defenses could be determined as a matter of law prior to the threshold determination of whether the general maritime law applied to the subject helicopter catastrophe.

As set forth in more detail below, the Appellate Division made clear that the dismissal was made and affirmed solely upon the federal military contractor defense. Even if Respondents demonstrated entitlement to summary judgment on state law defenses – which they did not – any state law determination would have to await the determination of general maritime law application to the instant naval helicopter catastrophe. This precise issue had been reserved for trial at least twice by the Appellate Division. Respondents' reliance upon defenses which were not, nor could they be, reached in the absence of trial, is untenable.

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REPLY TO RESPONDENTS' ARGUMENTS IN OPPOSITION

POINT I

THE APPELLATE DIVISION CLEARLY AFFIRMED THE DISMISSAL OF PETITIONERS' CLAIMS SOLELY UPON THE FEDERAL MILITARY CONTRACTOR DEFENSE.

Respondents' claim that this action was dismissed upon any defense other than the federal military contractor defense is belied by the March 23, 2004 Decision and Order of the Supreme Court of the State of New York, Appellate Division, First Department (3a-4a) which clearly held:

> Having now obtained the materials necessary to resolve previously open questions of fact, defendants' motion for summary judgment, based upon a more detailed government-contractor defense, was appropriate . . . [t]he newly amended affirmative defense satisfied the three-pronged test of government approval of reasonably precise specifications, conformity to those specifications, and a warning to the government about dangers known to the contractor in the use of the equipment (Boyle v. United Techs. Corp., 487 U.S. 500, 512 [1988]). Summary judgment was thus properly granted. *Id.*, at (4a).

Previously, Respondents attempted to obtain dismissal on their "lack of causation" argument, but failed. (39a-48a). In affirming denial of Respondents' prior motion for summary judgment, the Appellate Division recognized that Respondents failed to satisfy their well-settled burden of proof for summary judgment under New York State law:

> Defendants' motion for summary judgment was properly denied since they failed to come forward with evidence of causation eliminating the possibility that the accident was caused by a design or manufacturing defect in the helicopter's external cargo carrying system (see, Winegrad v. New York Univ. Medical Center, 64 N.Y.2d 851, 853). (37a).

The record below is bereft of any attempt by Respondents to produce what they previously lacked, admissible evidence of causation eliminating the possibility that the catastrophe which injured the Petitioner was caused by a design or manufacturing defect in the subject helicopter's cargo carrying system. Indeed, had Respondents produced such evidence after already being denied summary judgment on the issue of causation – which they did not – Respondents would also have been required to demonstrate the impossible, *to wit*, that newly discovered evidence not available previously justified a renewal of their motion for summary judgment on causation.

Clearly, Respondents had not met this onerous burden, nor were Respondents granted summary judgment based upon causation, as recognized by the

Appellate Division.[1]

POINT II

RESPONDENTS' RELIANCE ON STATE LAW PRODUCT LIBILITY DEFENSES IS UNTENABLE, AS THE GENERAL MARITIME LAW APPLIES TO THE SUBJECT ACCIDENT.

Respondents' assertion that state law provides an alternative ground to deny this application for certiorari is erroneous, inasmuch as the subject catastrophe is subject to the general maritime law.

Aside from the fact that Respondents never justified a dismissal based upon state product liability law,[2] the circumstances strongly indicate that general maritime law applies to the Petitioners' claims, a threshold issue left undetermined due to an erroneous dismissal based upon the federal military contractor defense.

Petitioners presented uncontroverted facts by an eyewitness to the subject action which clearly established admiralty jurisdiction over the instant proceeding.

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[1] For this reason alone, Respondents' reliance upon the improper *dicta* issued by the Supreme Court (Kornreich, J.) on an issue never placed before that trial Court, is patently improper.

[2] Indeed, Respondents shamelessly claim a fact, belied by their own documents, that "no operator, including the U.S. Government and the Uruguayan Government, reported to Respondents any incident or accident caused by an external cargo sling and hook system." Respondent's Brief In Opposition, at 24. *Compare, e.g.*, August 26, 1958 letter of U.S. Naval Air Mine Defense Unit, "d. Hook and Hook Release Mechanism"

The trial Court's Decision and Order of January 4, 2000 correctly noted that "actions involving aircraft engaged in activities traditionally performed by waterborne vessels fall within admiralty jurisdiction." (44a)(citing *Icelandic Coast Guard v. United Technologies Corp.*, 722 F.Supp. 942 (D Conn 1989). Likewise, the Court recognized that "plaintiffs have marshaled much support for their argument that General Maritime Law governs the instant case . . .." *Id.*

The trial court denied an earlier attempt by Respondents to seek judgment, as a matter of law, that the General Maritime Law was inapplicable. The Appellate Division, First Department affirming, squarely rejected Respondents' argument, finding that the:

> Admiralty Extension Act may be satisfied even when the complained of injury is suffered on land, provided only that the injury is caused by a vessel on navigable waters . . . [it is] neither unusual nor improper [that Plaintiffs] establish[ed] jurisdiction for their admiralty claims at the outset of the case provisionally by the means of a non-frivolous assertion of the jurisdictional elements. *Cesar v. United Technology of New York*, 3/1/99 N.Y.L.J. 28, col.

The Appellate Division clearly found that maritime jurisdiction was established for purposes of this action by the non-frivolous assertions of fact made by Petitioners' counsel, leaving the final determination of whether maritime law controlled until it could be established factually, at trial. On June 27, 2000, the

Appellate Division, First Department recognized:

> On the issue on the applicability of general maritime law, previously left unresolved by this Court (258 A.D.2d 424), while plaintiffs have submitted additional competent *and undisputed* evidence that the accident began over water, they still have not established a "maritime nexus" sufficiently to warrant a ruling [emphasis added]. Factual issues continue to exist as to whether the subject helicopter was designed to perform, and in fact at the time of the accident was performing, an activity traditionally performed by waterborne vessels (see O'Hara v. Bayliner, 89 N.Y.2d 636, 641-644, cert denied 522 U.S. 822).[3]

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[3] While Petitioners respectfully disagree with the denial of their summary judgment motion seeking to assert general maritime law, a trial was required, at the very least, to determine the threshold "maritime nexus" issue. The undisputed facts prove that the helicopter was demonstrating its ability to lift and *carry a jeep over water*. This activity, conducted by a naval helicopter, *could only* have traditionally been performed by an amphibious landing craft or other vessel. *See e.g. Preston v. Frantz*, 11 F.3d 357, 359 (2d Cir. 1993)("the helicopter . . . 'was engaged in a function traditionally performed by water-borne vessels; the ferrying of passengers' from the mainland over the high seas to an island.")(citing *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 219, 106 S.Ct. 2485, 92 [1986]); *see also Holcomb v. ERA Helicopters, Inc.*, 618 F.Supp 339, 343 (W.D.La 1985)("The crash of [a] helicopter, while it [is] being used in place of a vessel to ferry personnel and supplies to and from offshore drilling structures, bears the type of significant relationship to traditional maritime activity which is necessary to invoke admiralty jurisdiction."); *Garrett v. Air Logistics, Inc.*, 1996 WL 492300, Civ. A. No. 95-2190, *3 (E.D.La. 1996)("the ferrying of passengers from an island, albeit an artificial one, to the shore. This activity is clearly the type of activity that raises admiralty concerns and has more of a relationship to maritime law than the law of

(38a)

United Technologies Corp., was, and is, in the maritime business of making maritime products, *to wit*, naval helicopters, manufactured for and sold to the

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Louisiana.")(citing *Offshore Logistics, Inc. v. Tallentire, supra*).

The naval helicopters were fitted with both a 600 lb. capacity air-sea rescue hoist, and a 5,000 pound capacity external cargo carrying system when they arrived in Uruguay. The external cargo hook was Sikorsky part number S1650-62195. (R. 720) The general practice of the United States Navy "when altering the mission of the HSS-1 from anti-submarine warfare to external cargo carrying, is to order the entire installation kit [Sikorsky S1650-62195]." *Id.*

It is well settled that "[a]dmiralty jurisdiction in tort exists when the wrong (1) took place on navigable waters ('situs') , and (2) 'bear[s] a significant relationship to traditional maritime activity' ('status')." *See In the Matter of the Complaint of American Export Lines, Inc.*, 620 F.Supp. 490, 512 (S.D.N.Y. 1985)(quoting *Keene Corp. v. United States*, 700 F.2d 836, 843 (2d Cir.), *cert. denied*, 464 U.S. 864, 104 S.Ct. 195 (1983)[citing *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 254-61, 93 S.Ct. 493, 497-501 (1972) and *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674-75, 102 S.Ct. 2654, 2658 (1982].) Moreover, "[m]any courts have recognized that '[a] tort cause of action exists [in admiralty] for the negligent design and/or manufacture of a product, even though the conduct complained of may have occurred ashore." *Id.* (citing *Moser v. Texas Trailer Corp.*, 623 F.2d 1006, 1013 (5th Cir. 1980), *Smith v. Pan Air Corp.*, 684 F.2d 1102, 1111 (5th Cir. 1982), *Lindsay v. McDonnell Douglas Aircraft Corp.*, 460 F.2d 631, 635 (8th Cir. 1972), *In re Oil Spill by the Amoco Cadiz.*, 491 F.Supp. 170, 176 (N.D.Ill. 1979), *Anglo Eastern Bulkships Ltd. v. Ameron, Inc.*, 460 F.Supp. 1212, 1213 (S.D.N.Y. 1978), *Anglo Eastern Bulkships Ltd. v. Ameron, Inc.*, 556 F.Supp. 1198, 1200-04 (S.D.N.Y. 1982); *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968, 977 (5th Cir. 1978).

Clearly, the type of vessel is traditionally maritime in nature. *See e.g. Icelandic Coast Guard v. United Technologies Corp.*, 722 F.Supp. 942 (D. Conn 1989) (finding that helicopter manufactured for marine rescue and other maritime operations satisfied traditional maritime activity requirement.)

United States Navy for use in maritime activities. The accident helicopter was being used for its intended purpose, to carry a jeep over navigable waters, when a defect in the hook and cargo release – a defect which Respondents clearly had knowledge of since, at least, August 26, 1958 (49a-54a) – proximately caused the helicopter to crash, injuring Petitioners.

The threshold determination of whether the General Maritime Law controls is significant, inasmuch as "[d]rawn from state and federal sources, the General Maritime Law is an amalgam of traditional common-law rules, modifications of those rules and newly created rules." *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 864-65, 106 S.Ct. 2295, 2299 (1986). The General Maritime Law displaces the substantive laws of New York State in this action. *Id.* ("With admiralty jurisdiction comes the application of substantive admiralty law.") This includes the effect of substantive General Maritime Law upon, *inter alia*, the Petitioners' claims of strict products liability. *Id.*, at 865, 106 S.Ct., at 2299 ("We join the Courts of Appeals in recognizing products liability, including strict liability, as part of the general maritime law.").

The General Maritime Law's substantive effect on the claims asserted herein is substantial. The determination of the controlling substantive law absolutely affects Petitioners' and Respondents' trial strategies and burdens of proof. In *Landry v. Two R. Drilling Company*, 511 F.2d 138 (5th Cir. 1975), the Fifth Circuit Court of Appeals recognized:

> The burden on the plaintiff to prove proximate cause in actions based on the Jones Act and general maritime law is

> very light. Indeed, the most noted commentators in the field have called it 'featherweight.' Gilmore & Black, Admiralty (1957), s 6– 36, p. 311. The jury in such cases is entitled to make 'permissible inferences from unexplained events.' Johnson v. United States, 333 U.S. 46, 49, 68 S.Ct. 391, 92 L.Ed. 468 (1948), whether the case is brought under the Jones Act, id., or under general maritime law, Alaska S.S. Co., Inc. v. Petterson, 347 U.S. 396, 74 S.Ct. 601, 98 L.Ed. 798 per curiam (1954). The Supreme Court has repeatedly said that it is not the function of the court . . . to 'search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that proof gives equal support to inconsistent and uncertain inferences.' Tennant v. Peoria & P.U.R. Co., 321 U.S. 29, 35, 69 S.Ct. 409, 412, 88 L.Ed. 520 (1944); Schulz v. Penn. R. Co., 350 U.S. 523, 526, n.8, 76 S.Ct. 608, 100 L.Ed. 668 (1956).

Moreover, "under admiralty law, there is traditionally a strong interest in ensuring uniformity of decision." *American Export Lines, supra*, at 513. This is particularly so where, as here, the State of New York has virtually no interest in competing choice of laws, inasmuch as the accident occurred in Uruguay, the Plaintiffs were, and are, Uruguayan citizens, and the headquarters of the Defendants is not located in the State of New York. *See e.g., Damin Aviation Corp. v. Sikorsky Aircraft*, 705 F.Supp. 170, 174 (S.D.N.Y. 1989)("Connecticut is the principal place of business of Sikorsky . . .") The strong interests of a uniform law of

admiralty clearly outweigh the application of potentially inconsistent state law.

Application of the General Maritime Law to aircraft used in maritime activities is not new, and Respondents are well aware of such jurisprudence. *See e.g. Icelandic Coast Guard v. United Technologies Corp.*, 722 F.Supp. 942 (D. Conn 1989).

This Court should grant certiorari to resolve the vast departures from the requirements of federal law involved in this proceeding and protect the uniformity of the General Maritime Law.

CONCLUSION

It is respectfully requested that this Petition for a Writ of Certiorari be granted and that this Court exercise its jurisdiction.

Respectfully submitted,

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